United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-2028

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -X

NEVIN MAWHINNEY, :

Appellant, :

-against- :

ROBERT J. HENDERSON, Superintendent, :
PETER PREISER, Commissioner of
Corrections, and NORRIS, Lieutenant, :

Appellees. :

- -X

No. 76-2028

B
P/s

BRIEF FOR PLAINTIFF-APPELLANT

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QUESTIONS PRESENTED

1. Whether the District Court erred in dismissing appellant's complaint for failure to state a claim for relief where appellant clearly alleged that he was denied access to religious services while he was in punitive status.

2. Whether the District Court erred in dismissing appellant's complaint for failure to state a claim for relief where appellant clearly alleged that he was subjected to prison discipline without due process.

3. Whether the District Court erred in dismissing appellant's complaint without considering appellant's allegation that he was punished for exercising his right of access to the courts.

STATEMENT OF THE CASE

This appeal is from an order of the United States District Court for the Northern District of New York

(Foley, J.) (A.14-15)* dismissing appellant state prisoner's pro se civil rights complaint (A.4-13) brought under 42 U.S.C. §§1981-1983. Appellant's motion for permission to proceed in forma pauperis and for the assignment of counsel was granted by this Court on June 12, 1975.

This case was originally before this Court on November 20, 1975. At that time, appellee state prison officials argued for dismissal of the complaint because the notice of appeal had been filed one day late. Appellant moved that the notice of appeal be deemed timely since its late filing was due solely to appellees. This Court, considering only the jurisdictional question, remanded the case to the District Court to determine whether there was excusable neglect in the late filing of the notice of appeal (A.17). On February 4, 1976, Judge Foley held that the late filing was excusable, and deemed that the notice of appeal was timely filed (A.18-20). The case is now before this Court for consideration of the merits.

Appellant's complaint, filed on January 14, 1975, alleged that he was denied an opportunity to attend religious services while he was in keeplock and in punitive segregation at Auburn Correctional Facility** and that defendant

*Numbers in parentheses preceded by "A." refer to pages of appellant's separate appendix.

**Appellant has since been transferred to Fishkill Correctional Facility.

prison officials deny all prisoners who are in punitive status the right to attend religious services or religious programs.*

Appellant also stated that on November 13th, 1974, while he was in keeplock, a punitive status, he filed an application in a New York State Court, challenging certain practices of the prison officials. He alleged that solely in retaliation for filing this application he was subjected to more severe punishment by being transferred from keeplock to solitary confinement.

Thirdly, appellant alleged that he was denied due process in prison disciplinary hearings. He stated that he appeared before the prison disciplinary board and was sentenced to solitary confinement. However, when he requested to be informed of the charges against him in writing, and asked to be able to present witnesses to establish his innocence, he was told by the officer in charge of the hearing to "get the hell out of here", and he was denied the rights he requested.

Plaintiff sought injunctive relief and damages.

Before any answering papers were submitted, the district court dismissed the complaint for failure to state federal

*Judge Foley's opinion stated that appellant also alleged the denial of educational programs while in punitive confinement, but no such allegation appears in the complaint.

claims for relief. The court held that denial of religious services while in punitive confinement did not violate constitutional rights. The court also dismissed appellant's due process claims, ruling that the facts were insufficiently developed in the complaint to state a cause of action. The court noted that the defendants' rules governing disciplinary due process had been recognized as fair, without disposing of plaintiff's allegation that he did not receive the benefit of these rules. No mention was made in the court's opinion of appellant's claim of punishment in retaliation for exercise of his right of access to the courts.

Appellant here contends that the district court erred in dismissing his pro se complaint, since the complaint alleged three claims for relief, and that the case should be remanded to the district court for an evidentiary hearing on each claim.

ARGUMENT

POINT I

APPELLANT'S ALLEGATION THAT HE WAS DENIED ACCESS TO RELIGIOUS SERVICES WHILE HE WAS IN PUNITIVE STATUS STATES A CLAIM FOR RELIEF.

Appellant alleged in his pro se complaint that while he was in punitive confinement at Auburn Correctional Facility, he was denied the opportunity to attend religious services. He further alleged that it is the policy of defendants to deny religious services to all prisoners in punitive keeplock or segregation, without regard to the reasons for the punitive confinement.

It is now firmly established in this circuit that a prisoner's complaint of interference with the free exercise of religion states a claim for relief. Burgin v. Henderson, ___F.2d___, slip op.3831 (2d Cir. May 24, 1976); Mukmuk v. Commissioner of the Dept. of Corr. Servs., ___F.2d___, slip op. 1495 (2d Cir. Jan. 13, 1976); Kahane v. Carlson, 527 F.2d 492 (2d Cir. 1975); Pierce v. LaVallee, 293 F.2d 233 (2d Cir. 1961). The state can only interfere with a prisoner's right to exercise his or her religious beliefs "if the state regulation has an important objective and the restraint on religious liberty is reasonably adapted to achieving that objective" LaReau v. MacDougall, 473 F.2d 974, 979 (2d Cir.

1972), cert. denied 414 U.S. 878 (1973).* See also Cruz v. Beto, 405 U.S. 319 (1972); Cooper v. Pate, 378 U.S. 546 (1964).

In appraising the sufficiency of a complaint, the accepted rule is "that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief". Conley v. Gibson, 355 U.S. 41, 45-6, (1957).** In the instant case, appellant alleged in his complaint that defendants engaged in a policy which "denies all residents who are keeplocked and/or in punitive segregation, the right to attend religious services and/or any religious programs, without regard to the offence". (Complaint, A.5). This allegation is sufficient

*In Kahane this Court left open whether the stricter compelling state interest test applies to prison First Amendment claims since it found that the rationale for the prison regulation of kosher food for Jewish inmates in that case failed to rise to the level of an important or substantial governmental interest. Kahane v. Carlson, supra, 527 F.2d at 495.

At least two other circuits have adopted the compelling state interest test in resolving prisoner First Amendment religious claims. Brown v. Peyton, 437 F.2d 1228, 1231 (4th Cir. 1971); United States ex rel. Jones v. Rundle, 453 F.2d 147, 150 (3rd Cir. 1971); See also Remmers v. Brewer, 361 F. Supp. 537 (S.D. Iowa, 1973) aff'd, 494 F.2d 1277 (8th Cir. 1974).

**The complaint herein was dismissed before defendants responded to it. This practice has been criticized both for its unfairness to pro se litigants and for the increased amount of court time it requires to resolve the ultimate

(footnote cont'd on next page)

to state a claim under the liberal pleading requirements for pro se complaints, Haines v. Kerner, 404 U.S. 519 (1972).

The right to engage in communal worship, which is at issue in this case, is an element of crucial importance in the practice of all the major religions, Wilson v. Beame, 380 F. Supp. 1232, 1239-42 (E.D.N.Y. 1974), and allegations of the denial of an opportunity to participate in group services have been examined by the courts with special solicitude. The Seventh Circuit Court of Appeals, on remand in Cooper v. Pate, 382 F.2d 518 (7th Cir. 1967), invalidated a prison prohibition on Black Muslim services despite a substantial factual showing of the potential dangerousness of such worship. The Court there noted:

> There are less drastic and less sweeping means of achieving necessary control of such group services than categorically banning them . . . Proof which would be more than adequate support for administrative decision in most fields does not necessarily suffice when we are dealing with the constitutional guaranty of freedom of religion, and with an exercise of religion as widely considered essential as worship services. Id. at 522*.

(footnote cont'd)
issues. Burgin v. Henderson, supra; Frankos v. LaVallee, ___F.2d___, slip op. 2747, 2749 (2d Cir. March 23, 1976).

*See also Sostre v. McGinnis, 334 F.2d 906 (2d Cir., 1964), cert. denied, 379 U.S. 892 (1964); Battle v. Anderson, 376 F. Supp. 402 (E.D. Okla. 1974); Knuckles v. Prasse, 302 F. Supp. 1036 (E.D. Pa. 1969), aff'd, 435 F.2d 1255 (3rd Cir. 1970), cert. denied 403 U.S. 936 (1971); Fulwood v. Clemmer, 206 F. Supp. 370 (D.D.C. 1962).

In examining this question, courts have often mandated that the state provide extra security measures so that prisoners in higher security status than the general population could attend communal religious services, Wilson v. Beame, supra, 380 F. Supp. 1232 (E.D.N.Y. 1974); Glenn v. Wilkinson, 309 F. Supp. 411 (W.D. Mo. 1970); Konigsberg v. Ciccone, 285 F. Supp. 585 (W.D. Mo. 1968), aff'd on other grounds, 417 F.2d 161 (8th Cir. 1969), cert. denied, 397 U.S. 963 (1970). Where some restriction on access to religious services was allowed, it was usually only after a determination at an evidentiary hearing that the particular individuals deprived of this right would pose grave risks to the security of the prison if allowed to participate in group services, LaReau v. MacDougall, 473 F.2d 974 (2d Cir. 1972), cert. denied, 414 U.S. 878 (1973); Sharp v. Sigler, 408 F.2d 966 (8th Cir. 1969); that reasonable alternatives to communal worship were provided by prison authorities, Adams v. Carlson, 352 F. Supp. 822 (E.D. Ill. 1973); United States ex rel. Cleggett v. Pate, 229 F. Supp. 818 (N.D. Ill. 1964); or that the prisoner's allegations were not factually supported, Breece v. Swenson, 332 F. Supp. 837 (W.D. Mo. 1971).*

*Model Rules and Regulations on Prisoners' Rights and Responsibilities, (Krantz, Bell, Brant and Magruder, 1973) prepared by the Center for Criminal Justice of Boston University School of Law, provides in Rule IB-7a that attendance at regular religious services be permitted to inmates in punitive segregation except in situations involving an unusually burdensome security risk, in which case adequate alternatives are required.

This Court has already examined the question presented here. In LaReau v. MacDougall, supra, 473 F.2d 974 (2nd Cir. 1972), cert. denied, 414 U.S. 878 (1973), the Court permitted the exclusion of a prisoner from religious services only after a convincing showing at an evidentiary hearing that he would use this opportunity to provoke a major prison rebellion, and noted:

> "This is not to say that every prisoner in segregation can be prevented from attending church services in the chapel. Not all segregated prisoners are potential trouble-makers; so some discrimination must be made by prison authorities among the inmates in the segregation unit". Id. at 979-80 n.9.

Cf., Wright v. McMann, 387 F.2d 519 526-527, n.17 (2d Cir. 1967).

In this case, the arbitrary denial of religious freedom, with no determination as to its necessity, clearly fails to meet the requirements of the First Amendment's guaranty of religious freedom. An evidentiary hearing is required to determine whether such an impermissible practice is followed by defendant state officials, and whether the particular facts of appellant's disciplinary confinement justified this interference with his First Amendment rights.

POINT II

APPELLANT'S ALLEGATION THAT HE WAS SUBJECTED TO PRISON DISCIPLINE WITHOUT DUE PROCESS STATES A CLAIM FOR RELIEF.

Appellant alleged that he was denied due process in prison disciplinary proceedings. In two separate paragraphs, (Complaint, A. 7, 8) appellant stated:

> It is normal procedure at this facility when an inmate is placed in solitary he is interviewed weekly for evaluation. When plaintiff was interviewed he was informed he would remain in solitary another week. Plaintiff then requested and was denied his rights as in McDonnell v. Wolff, 483 F.2d 1059.
>
> When plaintiff requested due process (notification of the charge he was being punished for in writing and the right to call witnesses) to establish his innocence the officer interviewing plaintiff said "Get the hell out of here". Such is the total disrespect defendants and their officers have for the rights of the general inmate population.

In dismissing this part of the complaint, the district court seemed to base its decision on an insufficient development of the facts by this pro se petitioner. The court noted that the regulations of the Department of Correctional Services governing prison disciplinary proceedings have been found to be adequate. However, this observation would not have disposed of the issue before the court since appellant clearly alleged that he did not receive the benefit of any such regulations. Likewise, the court's observation that the

Eighth Circuit's ruling in McDonnell v. Wolff had been modified by the United States Supreme Court is inapposite, since the specific due process rights which appellant claims he was denied - notification in writing of the charges against him, and the right to call witnesses - are recognized as necessary elements of due process by the Supreme Court. Wolff v. McDonnell, 418 U.S. 539 (1974), Baxter v. Enomoto, 19 Cr. L.R. 3003 (U.S. April 20, 1976).* Thus, there remains as justification for the dismissal only the district court's statement that the facts were not "further developed".**

In fact, appellant raised in his pro se complaint a clear and complete description of events which, if proved, make out a deprivation of his right to due process in disciplinary proceedings. Wolff v. McDonnell, supra; Baxter v. Enomoto, supra; Crooks v. Warne, 516 F.2d 837 (2d Cir. 1975); Powell v. Ward, 392 F. Supp. 628 (S.D.N.Y. 1975).

*Written notice of the charges was held to be a requirement of due process in all cases where serious punishment (including solitary confinement) could be imposed. Witnesses may be called in all cases where it will not be unduly hazardous to institutional safety or correctionsl goals. Wolff at 564, 566; Baxter at 3007.

**The district court's reference to Williams v. McMann, 454 F.2d 1139 (2d Cir. 1972), is not dispositive of the instant case. In Williams, the plaintiff alleged that he had received a two-day lockup for breaking an institutional rule, and sought broad injunctive relief against "further abuse and lockups". Because there was no allegation of a pattern of harrassment, and no challenge to the institutional rules, the case lacked a claim for relief.

Appellant's pro se complaint, held to the "less stringent standard than formal pleadings drafted by lawyers", Haines v. Kerner, supra, 404 U.S. 519, 520 (1972), clearly sets forth facts which, if proven, would entitle him to relief. Conley v. Gibson, supra, 355 U.S. 41 (1957).

POINT III

APPELLANT'S ALLEGATION THAT HE WAS PUNISHED FOR EXERCISING HIS RIGHT OF ACCESS TO THE COURTS STATES A CLAIM FOR RELIEF.

Appellant's complaint (A.6) stated:

> On the 13 day of November, 1974, plaintiff filed an application pursuant to Article 78 of the Civil Practice Laws and Rules of New York State requesting aid, contending it constituted cruel and unusual punishment for Auburn officials to force inmates to stand out in foul weather for up to and exceeding one (1) hour in order to eat and the Auburn Correctional Facilities procedure of denying religious worship to all inmates keeplocked without regards to the offence the inmate may be keeplocked for was in violation of the First Amendment to the Constitution of the United States. At the time of this filing petitioner was so keeplocked and denied.
>
> On November 22, 1974, plaintiff was sent to solitary confinement as a form of harassing plaintiff for so filing . . . .

Although the district court made no mention of this allegation in its Memorandum - Decision and Order of February 26, 1975, it does state yet a further claim for relief.

A prisoner has a due process right of access to the courts, Ex Parte Hull, 312 U.S. 546 (1941). Johnson v. Avery, 393 U.S. 483 (1969) made clear that no punishment can be imposed for exercising this right in a reasonable manner. This Court noted in Sostre v. McGinnis, 442 F.2d 178, 189 (2d Cir. 1971) that confinement to segregation

for past or threatened litigation against prison officials constituted a due process violation. In Andrade v. Hauck, 452 F.2d 1071 (5th Cir. 1971), a prisoner alleged that he had lost his commissary privileges in retaliation for writing to a Judge of the United States District Court with complaints about commissary operations. In reversing the dismissal of his complaint, the circuit court, stated:

> . . . every prisoner has a constitutional right of access to the courts to present any complaints he might have concerning his confinement. He cannot be disciplined in any manner for making a reasonable attempt to exercise that right. Access to the courts is a fundamental precept of our system of government. No citizen, regardless of his transgressions, is ever to be legally consigned to the total and unreviewed power of any single branch of government. Id. at 1072.

See also Grene v. Britton, 455 F.2d 473 (5th Cir. 1972); Hooks v. Kelley, 463 F.2d 1210 (5th Cir. 1972); Fulwood v. Clemmer, 295 F.2d 171 (D.C. Cir. 1961).

Appellant's allegation that he was moved from keeplock status in his own cell to the solitary confinement unit of the prison, solely because he applied to the state courts for relief from what he considered illegal action against him by prison officials, clearly states a claims for relief.

CONCLUSION

FOR THE ABOVE STATED REASONS, THE DECISION OF THE DISTRICT COURT SHOULD BE REVERSED.

Respectfully submitted,

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Dated: New York, New York
May 28, 1976

CERTIFICATE OF SERVICE

This will certify that on May 28, 1976, I served a true copy of the within brief and appendix upon defendants, by depositing the same in a United States Postal Service official depository, in a pre-paid envelope addressed to: The Attorney General of the State of New York, Two World Trade Center, New York, N.Y. 10047, Attention: David Birch, Assistant Attorney General.

Ellen J. Winner
Ellen J Winner

Sworn to before me this
28th day of May, 1976

Michael B Mushlin
Notary Public

MICHAEL B. MUSHLIN
Notary Public, State of New York
No. 31-2837235
Qualified in New York County
Commission Expires March [illegible], 197[illegible]